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No. 78

In the Supreme Court of the United States

OCTOBER TERM, 1944

AMERICAN BROACH EMPLOYEES PROTECTIVE ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND AMERICAN BROACH & MACHINE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The Circuit Court of Appeals did not deliver an opinion. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 110–167) are reported in 45 N. L. R. B. 241.

JURISDICTION

The decree of the court below was entered on December 17, 1943 (R. 1117). A petition for rehearing filed by petitioner was denied on February

11, 1944 (R. 1120). The petition for a writ of certiorari was filed on May 9, 1944. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether petitioner, an incorporated labor union, was denied due process of law by reason of the refusal of the Board's Trial Examiner to adjourn the hearing in order that members of petitioner might be summoned to hear testimony concerning them.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151 *et seq.*) are set forth in the Appendix, *infra,* p. 9.

STATEMENT

Upon the usual proceedings the Board, on October 31, 1942, issued its findings of fact, conclusions of law, and order (R. 110–167). The Board found, *inter alia,* that American Broach & Machine Company (hereinafter referred to as the Company) had dominated and interfered with the administration of petitioner, the American Broach Employees Protective Association, and contributed support to it in violation of the Na-

tional Labor Relations Act. Accordingly, the Board entered its usual remedial order requiring the Company to disestablish petitioner. On November 27, 1942, the Board filed a petition to enforce its order in the Circuit Court of Appeals for the Sixth Circuit (R. 1–5). On December 17, 1943, the court below entered a decree, unaccompanied by an opinion, enforcing the Board's order in full (R. 1117).

Petitioner challenges the decision and order of the Board and the decree of the court below on the ground that petitioner was denied a fair hearing before the Board. This contention arises from the following circumstances:

At the hearing held before a Trial Examiner of the Board on the complaint issued against the Company, petitioner was granted leave to intervene (R. 171). At the commencement of the hearing a substantial number of the Company's employees, including members of petitioner, absented themselves from their work in order to attend the hearing. Their absence threatened seriously to impair the production of various machines and tools which the Company was then manufacturing for use by numerous ordnance and other plants making military equipment. Indeed, as petitioner states, "the presence of the full membership of the Association [at the hearing] resulted in practically closing the American Broach and Machine Company shop" (Pet. 6, R.

680–681). To avoid any disruption in the flow of its products, for which there was urgent demand, the Company at the request of the National War Labor Board posted a notice at its plant that all of the men would be expected to stay on their jobs unless they attended the hearing as witnesses (R. 273–274, 681, Int. Exh. 6). Following the posting of this notice petitioner moved to adjourn the hearing indefinitely "or until such time as the War Department will permit witnesses" and "all persons interested" to attend the hearing (R. 270, 271). The Trial Examiner denied the motion, but assured petitioner's counsel that "if you feel at any time that on any particular matter you need an opportunity to confer with somebody, either here or overnight, or noon, you present that to me, and I will do everything possible to see that you are given the rights that you are entitled to" (R. 271–274).[1]

Thereafter, petitioner on various occasions during the course of the hearing moved to adjourn the proceedings in order that particular members of the Association to whom reference was being made by the witness then testifying might be

[1] The Trial Examiner, explaining his ruling, said, "* * * nobody connected with this case has indicated that parties have no right to be here, that the public is being excluded. Now, as to whether or not men ought to be at work on war industry is something that I am not passing on. I don't see the necessity of having everybody interested present at this hearing when they have representatives. It is on that basis that I am now * * * denying the motion" (R. 273).

summoned from their place of work to the hearing room and be present while such testimony was being given (R. 277, 279–280, 328–330). The Trial Examiner denied these motions (R. 277, 279–280, 329–330). On the third day of the hearing the Trial Examiner, acting upon instructions from the Board, given at the request of the National War Labor Board and the War Department, and because of the continued presence at the hearing of a large number of employees as spectators, posted a notice in the hearing room requesting "in the interest of uninterrupted war production, that no employees of the * * * Company attend these hearings as spectators during their working hours" (R. 281, 383). Petitioner thereupon renewed its motion for a "discontinuance" of the hearing, and the Trial Examiner denied the motion (R. 384–387).

Throughout the hearing, petitioner, a corporation, was represented by counsel, who examined and cross-examined witnesses, had reasonable opportunity to consult its members and representatives, some of whom remained at the hearing,[2] and to produce whatever witnesses it desired (R. 960–961, 936–939, 280–281, 291, 312, 313, 317, 352, 363, 369, 389, 391–392, 413, 449, 456, 473, 518, 571, 604, 616 625, 637, 644, 673, 764, 836, 908, 940, 964

[2] Petitioner went so far as to obtain an order from a court of the State of Michigan restraining the Company from taking any disciplinary action against any employee who attended the hearing (R. 384–386, Int. Exh. 7).

972, 980, 989, 995, 1015, 1020, 1024, 1029, 1057, 1070, 1085).

The Board and the court below reviewed the rulings of the Trial Examiner set forth above, found that no prejudicial error had been committed, and affirmed them (R. 112, 1117).

ARGUMENT

Petitioner contends that the Trial Examiner's refusal to adjourn the hearing in order that particular members of petitioner might be summoned to hear the testimony of the Board's witnesses concerning them constituted a denial of due process to petitioner (Pet. 3). We submit that this contention is without merit.

Petitioner's argument is drawn from the constitutional privilege of a defendant in a criminal case to confront his accusers and cross-examine them face to face. *Gaines* v. *Washington,* 277 U. S. 81, 85; *Hopt* v. *Utah,* 110 U. S. 574. But even in a criminal prosecution, "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder* v. *Massachusetts,* 291 U. S. 97, 107–108; cf. *Howard* v. *Kentucky,* 200 U. S. 164; *Schwab* v. *Berggren,* 143 U. S. 442; *Fielden* v. *Illinois,* 143 U. S. 452; *Lambert* v. *Barrett,* 159 U. S. 660; *Dowdell* v. *United States,* 221 U. S. 325; *Kelley* v. *Oregon,* 273 U. S. 589; *Johnson* v. *United*

States, 318 U. S. 189, 201–202. Here petitioner, a corporation, was represented at all times throughout the hearing by counsel, who, as has already been noted (*supra,* p. 5), had reasonable opportunity to consult its members and representatives, some of whom remained at the hearing. Due process of law obviously does not require the presence of all members of an incorporated association at a proceeding to which it is a party.

The question whether the hearing should have been adjourned in order to enable petitioner's counsel to summon particular members whenever reference was made to them in the testimony plainly rested within the sound discretion of the Trial Examiner. *National Labor Relations Board* v. *Algoma Plywood & Veneer Co.,* 121 F. (2d) 602, 604–605 (C. C. A. 7); cf. *Holder* v. *United States,* 150 U. S. 91, 92; *Franklin* v. *South Carolina,* 218 U. S. 161, 168; *National Labor Relations Board* v. *Quality & Service Laundry, Inc.,* 131 F. (2d) 182, 183 (C. C. A. 4); *Oliver* v. *United States,* 121 F. (2d) 245, 250 (C. C. A. 10), certiorari denied, 314 U. S. 666. The Trial Examiner's rulings were wholly reasonable in view of all the circumstances. In effect, attendance of witnesses was limited to those who were to testify in any single day. No showing is made that any relevant evidence was not adduced; or that any witnesses were not given an opportunity to be heard; or that petitioner was denied the right of cross-examination. The

record thus affords no basis for the conclusion that petitioner was denied due process of law, or that the Trial Examiner's rulings constituted an abuse of discretion.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should therefore be denied.

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JULY 1944.